No. 17-1307

IN THE

Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS LLP, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. The Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.* (the "FDCPA"), has been a major focus of NCLC's work. NCLC publishes *Fair Debt Collection* (9th ed. 2018), and *Collection Actions* (4th ed. 2017), comprehensive treatises to assist attorneys and debt collectors to comply with the law. This Court has relied upon *Fair Debt Collection* as supporting authority. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 559 U.S. 573, 591 n.12 (2010). In addition to its debt collection work, NCLC works on a variety of issues related to foreclosures and mortgage servicing. NCLC publishes *Foreclosures and Mortgage Servicing* (5th ed. 2014), with a new edition forthcoming in 2018.

SUMMARY OF ARGUMENT

A mortgage foreclosure is the enforcement of a promissory note. A promissory note is a debt obligation. The McCarthy law firm regularly represents holders of promissory notes in foreclosures. These incontrovertible facts make the firm a "debt collector" under the first sentence of the FDCPA's definition of that term. 15 U.S.C. §1692a(6). The third sentence of §1692a(6) extends the definition of "debt collector" to a more narrowly defined category of debt collectors, namely enforcers

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Counsel for both parties have filed letters of blanket consent to the filing of amicus briefs with the Clerk.

of security interests who do not otherwise qualify as debt collectors under the general definition. Since McCarthy is clearly a debt collector under the general definition, it is not necessary to decide whether the firm qualifies as a debt collector under the narrow additional category.

Foreclosures are costly for homeowners. They are also costly for investors, government mortgage insurers, and entire communities. For this reason, investors, government insurers, federal agencies, and state laws require that those conducting foreclosures communicate regularly with homeowners throughout the foreclosure process. Before they can conduct a foreclosure sale, mortgage servicers and their attorneys must ensure that all alternatives to foreclosure have been exhausted. Today, in a state like Colorado, only about thirty percent of foreclosures that law firms commence result in a completed foreclosure sale. In the vast majority of cases the attorney withdraws the foreclosure before any sale takes place because the homeowner arranged an alternative to foreclosure.

It is inaccurate to say that a foreclosure law firm does nothing more than recover possession of collateral property. Foreclosure lawyers are not tow truck drivers who repossess motor vehicles. Instead, the law firms play an active role in communicating vital information to homeowners, trustees, and the courts during an extended process that plays out in a heavily regulated field.

Unfortunately, foreclosure law firms and their servicer clients have a miserable record at providing accurate information. Congressional reports and agency enforcement actions at the federal and state levels have repeatedly found widespread misconduct

in the routine work of these participants in the foreclosure industry. In 2012, for example, the attorneys general of forty-nine states, the Department of Justice, and HUD imposed sanctions totaling over $50 billion on the five largest mortgage servicers related to their conduct of foreclosures. Key aspects of the resulting consent decree addressed servicers' interactions with their attorneys. Courts have repeatedly expressed exasperation over the way the largest financial institutions and their attorneys handle routine foreclosures. Local courts and state legislatures have channeled substantial resources into the oversight of foreclosures, including mandating mediation, in an effort to promote the accurate delivery of information to consumers.

This case involves a straightforward request by a homeowner to get the facts about the status of his mortgage account. The FDCPA provides a right and remedy to the consumer to facilitate this exchange of information. Mr. Obduskey attempted to exercise this right at a critical time—when he received a notice from an attorney that a foreclosure action against his home was about to begin. Despite the plain text of the FDCPA's definition of "debt collector," the Tenth Circuit arrived at an interpretation of the Act that strips away the FDCPA's most essential protections from those most in need of them. For the reasons discussed below the Court's ruling should be reversed.

ARGUMENT

I. Introduction—the Role of Nonjudicial Foreclosures and Deficiency Claims.

In a judicial foreclosure a court enters a judgment in a civil action directing a sale of the mortgaged premises. The goals of the court-ordered sale are to satisfy the mortgage debt by transferring title of the property to the high bidder. In a nonjudicial foreclosure the lender or its assignee exercises a contractual right contained in the loan documents (a "power of sale" clause) to cause the property to be sold. Once again, the goals are to satisfy the mortgage debt and transfer title.

In thirty states nonjudicial foreclosures are permitted and are the primary method of foreclosing on residential properties.[2] Of these thirty primarily nonjudicial foreclosure jurisdictions, ten have enacted statutes that bar deficiency claims by the owner of the debt if the foreclosure sale does not produce enough money to satisfy the debt. These ten are primarily Western "deed of trust" states.[3] The bars on deficiency claims in these states apply only if the lender chooses the nonjudicial foreclosure option. In all jurisdictions that permit nonjudicial

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[2] *See* National Consumer Law Center, *Foreclosures and Mortgage Servicing*, Appendix F (Summary of State Foreclosure Laws) (5th ed. 2014). The figure includes the District of Columbia. Of these thirty jurisdictions typically referred to as allowing "nonjudicial" foreclosure procedures, four (Colorado, North Carolina, Maryland, and Louisiana) actually have "hybrid" systems that involve some limited judicial oversight before and after foreclosure sales.

[3] *Id.* These are: Alaska, Arizona, California, Hawaii, Minnesota, Montana, Nevada, North Dakota, Oregon, and Washington. The Nevada bar on deficiencies applies only to deeds of trust executed after October 2009.

foreclosures, lenders may still choose the judicial foreclosure option. Deficiency claims are always allowed after judicial foreclosures.

The majority of nonjudicial foreclosure states *do not* bar deficiency claims after nonjudicial foreclosure sales. However, in rendering its decision, the Tenth Circuit acted on the assumption that "[t]here is an obvious and critical difference between judicial and non-judicial foreclosures" and referred to a general bar on deficiency claims after nonjudicial foreclosures. *Obduskey v. Wells Fargo,* 879 F.3d 1216, 1221 (10th Cir. 2018). At the same time the Court acknowledged that Colorado, a nonjudicial foreclosure state, does not bar post-sale deficiency claims. *Id.*

The issue presented for this appeal is whether the FDCPA applies to nonjudicial foreclosures. Resolution of this question should not turn on whether a state's foreclosure laws bar post-foreclosure deficiency claims. A focus on whether a nonjudicial foreclosure bars a deficiency claim *after* a foreclosure sale reveals nothing about whether collection activities that occur *before* the foreclosure sale violate the FDCPA. The FDCPA violations in Mr. Obduskey's case occurred in the absence of any foreclosure sale. The fact that under certain state statutes a debt may later be extinguished after a nonjudicial foreclosure sale is not relevant when the FDCPA violation occurs while the debt clearly exists.

II. The Tenth Circuit Failed to Consider Each Distinct Element of Mr. Obduskey's FDCPA Claim and Instead Focused on an Erroneous Construction of the Term "Debt Collector."

Mr. Obduskey appropriately pled the statutory elements of an FDCPA claim, including: (1)

the obligation under his mortgage note was a "debt" (15 U.S.C. §1692a(5)); (2) the McCarthy Law Firm was a "debt collector" (15 U.S.C. §1692a(6)); and (3) McCarthy sent Mr. Obduskey an initial communication "in connection with" collection of the debt, but then proceeded with debt collection without responding to Mr. Obduskey's request for information about the debt, violating the FDCPA (15 U.S.C. §§1692g(b)).

The analysis of Mr. Obduskey's FDCPA claim must proceed step-by-step, giving appropriate weight to the plain statutory language and the meaning of the terms "debt," "debt collector," and "in connection with" the collection of a debt. Rather than analyze whether Mr. Obduskey had pled each statutory element, the Tenth Circuit conflated the three under the guise of construing the single term "debt collector." *Obduskey*, 879 F.3d at 1220–22.

A. Mr. Obduskey's Promissory Note Was a "Debt" Under 15 U.S.C. §1692a(5).

The term "debt" in the FDCPA means "any *obligation* or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property . . . . which are the subject of the transaction are primarily for personal, family, or household purposes" 15 U.S.C. §1692a(5) (emphasis added).

The Tenth Circuit relied heavily on the analysis of the term "debt" by the Ninth Circuit in *Vien-Phuong Thi Ho v. Reconstruct Co., N.A.*, 858 F.3d 568 (9th Cir. 2017), *cert. denied* 138 S. Ct. 504 (2017) ("*Ho*"). The *Ho* court equated the word "debt" that is defined in §1692a(5) of the FDCPA with "money." *Ho*, 858 F.3d at 571. The *Ho* court pointed out that after a trustee's sale, the trustee collects

money from the property's purchaser, not from the consumer. *Id.* at 572. The court went on to say, "Because the money collected from a trustee's sale is not money owed by a consumer, it isn't 'debt' as defined by the FDCPA." *Id.*

This statement is wrong for three reasons. First, it incorrectly equates "debt" with money and with the act of paying money, instead of with an *obligation* to pay money—ignoring the clear language of §1692a(5). Second, the money at issue *is* owed by the consumer. It is part of the debt obligation being enforced, *i.e.*, the note. Third, the interpretation of §1692a(5) conflicts with the plain language of 15 U.S.C. §1692a(6) that defines a debt collector as someone who "directly or indirectly" collects debts. The analysis effectively reads the word "indirectly" out of the statute and would require a transfer of money directly from the consumer to the debt collector, something the statute does not require.

1. A Mortgage Is an Obligation to Pay Money.

There are two key documents that make up a mortgage transaction. One is the promissory note. The other is the security instrument (the mortgage or deed of trust). *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1216 (11th Cir. 2012). The note embodies the borrower's obligation to pay the debt. The mortgage designates the property that serves as collateral for payment of the debt, while the note is the source of the obligation to pay. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) §5.4(c) (1997) ("A mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation the mortgage secures.").

The primacy of the note over the mortgage is a principle that has long been recognized in American law. *Carpenter v. Longran*, 83 U.S. 271, 275 (1872); *McGoveny v. Gwillim*, 16 Colo. App. 284, 65 P. 346, 347 (1901) ("In Colorado, whether the form of security be a mortgage or a deed of trust, the debt is the principal thing. The security is a mere incident."). *See also Martinez v. Continental Enterprises*, 730 P.3d 308, 314 (Colo. 1986) ("Where, as here, any action to recover payment on a promissory note is barred by the six-year statute of limitations, foreclosure of the deed of trust securing the note is also barred.")

Despite some initial confusion spawned by the growth of securitized mortgage debt, most state courts have reached a consensus that a mortgage foreclosure, including foreclosure of a deed of trust, is the enforcement of a promissory note. *Yvanova v New Century Mortgage Corp.*, 62 Cal. 4th 919, 928, 365 P.3d 845, 851 (2016) ("In itself, the principle that only the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust securing that debt is not, or at least should not be, controversial."). Dale A. Whitman and Drew Milner, *Foreclosure on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note*, 66 Ark. L. Rev. 21 (2013). Mortgage notes today are treated as negotiable notes and their enforcement is governed by Article 3 of the Uniform Commercial Code ("U.C.C.").[4] The party

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[4] Report of the Permanent Editorial Board for the Uniform Commercial Code: Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes (Nov. 14, 2011). Available at http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf.

with authority to enforce the note (determined under U.C.C. §3-301) is the only party entitled to foreclose a mortgage or deed of trust. *In re Miller*, 666 F.3d 1255 (10th Cir. 2012) (applying Colorado U.C.C. Article 3 to determine whether the creditor established authority to enforce a deed of trust, referencing the requirements of Colo. Rev. Stat. §§38-38-100.3(8), 38-38-101(1)(b)(I)–(III)).

Under the Article 3 framework, Mr. Obduskey was the maker of a mortgage note. Wells Fargo, according to McCarthy, was the beneficiary of the note and had the right to enforce it. Any payments made in connection with Mr. Obduskey's deed of trust had to go directly toward satisfaction of the debt defined by his promissory note. *In re Veal*, 450 B.R. 897, 910 (B.A.P. 9th Cir. 2011) ("Put another way, if a maker makes a payment to a 'person entitled to enforce,' the obligation is satisfied on a dollar for dollar basis, and the maker never has to pay that amount again.").

2. A Mortgage Note Is Owed by the Consumer Borrower.

The money at issue in a foreclosure *is* owed by the borrower. It is incorporated in the debt obligation being enforced, *i.e.*, the note. One purpose of every mortgage foreclosure sale is to obtain money that must be applied to eliminate or reduce dollar for dollar the amount owed on the note signed by the borrower. Colorado courts, like those of nearly all states, acknowledge this aspect of foreclosures. *Shapiro & Meinhold v. Zartman*, 823 P.3d 120, 124 (Colo. 1992) (*en banc*) ("a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt"); *McGoveny v. Gwillim*, 16 Colo. App. 284, 65 P. 346, 347 (1901) ("An action to

foreclose a mortgage or deed of trust is simply, in effect, an action to collect the debt, to secure the payment of which was the sole purpose of its execution.").

3. Equating "Debt" With "Money" Under the FDCPA Conflicts with the Plain Language of §1692a(6), Which Defines a Debt Collector as Someone Who "Directly or Indirectly" Collects Debts.

In construing the term "debt" the Tenth Circuit implied a requirement for direct payment to the debt collector. Such a requirement is not only entirely absent from the definition of "debt" in §1692a(5), but it is plainly contradicted by the "directly or indirectly" reference to debt collection in the definition of "debt collector" found in §1692a(6).

The foreclosure process in Colorado inherently involves attempts, both directly and indirectly, to collect a debt. The line of cases upon which the Tenth Circuit relied is grounded on the false proposition that "foreclosing on a trust deed is distinct from the collection of the obligation to pay money." *Hulse v. Ocwen Fed. Bank, FSB,* 195 F. Supp. 2d 1188, 1204 (D. Or. 2002). This proposition is erroneous as a matter of both contract law and property law. As described above, foreclosure directly enforces the creditor's contractual right to payment under the note. Foreclosure also drastically impacts the borrower's property rights. The attorney's scheduling a foreclosure sale forces the borrower to pay the debt in full by the sale date or forever lose the right to acquire unencumbered title to the property. Colo. Rev. Stat. §38-38-501; *Mount Carbon Metropolitan District v. Lake George Co.,*

847 P. 2d 254, 256–57 (Colo. Ct. App. 1993). In addition, setting a sale date triggers a strict time limit for the right to cure. In curing a default the borrower may stop the sale by paying only the arrearage, rather than the full redemption amount. A Colorado statute allows the borrower to cure a default by paying "all sums that are due and owing under the evidence of debt and deed of trust" up to noon on the day of a scheduled foreclosure sale. Colo. Rev. Stat. §38-38-104(2)(b).

Finally, a foreclosure sale under Colorado law does not end the borrower's obligation to pay the debt. Colorado has not enacted any statutory bar on post-foreclosure deficiency claims. *Franks v. Colorado National Bank of Arapahoe,* 855 P.2d 455, 457 (Colo. Ct. App. 1994). Before a foreclosure sale in Colorado, the attorney for the noteholder prepares and submits to the public trustee an itemized bid form. This form includes the creditor's deficiency claim. Colo. Rev. Stat. §38-38-106.

Through all of these means the foreclosure attorney uses the property both directly and indirectly to compel payment of the debt.

B. The McCarthy Law Firm is a "Debt Collector" Under 15 U.S.C. §1692a(6).

The FDCPA defines a "debt collector" to be someone who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another" 15 U.S.C. §1692a(6). As discussed below, the McCarthy firm meets this "regularly collects" debt collector definition.

1. McCarthy Regularly Engages in Direct and Indirect Collection of Debts for Others—the Beneficiaries of Mortgage Notes.

The McCarthy firm is a major law office that routinely conducts foreclosures in the Western deed of trust states.[5] As discussed in the preceding section, the goal of these foreclosures is to collect a "debt." Mr. Obduskey's Complaint appropriately alleged that the McCarthy firm is engaged in the practice of regularly collecting debts owed to others. Complaint ¶ 4 (J.A. 29).

In its August 2014 initial contact letter to Mr. Obduskey (J.A. 37) and its May 12, 2015 Notice of Election and Demand for Sale by Public Trustee (J.A. 39), the McCarthy firm identified itself as representing Wells Fargo. McCarthy stated that it had been "instructed to commence foreclosure" against Mr. Obduskey's residence. (J.A. 37). McCarthy identified Wells Fargo as the "Current Holder of the Evidence of the Debt." (J.A. 39). The law firm stated unequivocally that it was enforcing both the "Deed of Trust" and the "Evidence of Debt." *Id.* Thus, the debt at issue was clearly "owed or due another."

In undertaking to represent the holder of Mr. Obduskey's promissory note in a Colorado foreclosure, McCarthy was obligated to perform specific tasks that constituted direct or indirect debt collection. The foreclosure law firm must ensure that the entity seeking to foreclose has evidence of the debt and has authority to foreclose, and then must

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[5] A Westlaw search indicates approximately one thousand decisions that involve foreclosure actions listing the McCarthy firm as counsel of record.

certify this information to the public trustee. Colo. Rev. Stat. §38-38-101. The attorney prepares the pre-foreclosure notice to the borrower (Colo. Rev. Stat. §38-38-102.5) and the notice of election and demand for sale (Colo. Rev. Stat. §38-38-101(4)). The firm must monitor compliance with state law requirements that loss mitigation options be considered before a foreclosure sale. Colo. Rev. Stat. §38-38-103.2. The firm must provide correct cure information to the trustee and must be prepared to stop the foreclosure if the borrower pays the appropriate cure amount. Colo. Rev. Stat. §38-38-104(2). Before a foreclosure sale, the firm must submit a bid form to the public trustee. Colo. Rev. Stat. §38-38-106. The bid form requires that the attorney identify the amount of the deficiency owed. *Id.*

In addition, like any law firm representing the noteholder in a Colorado foreclosure, McCarthy must appear in judicial proceedings. Colo. Rev. Stat. §38-38-105. These proceedings are governed by Colo. R. Civ. P. 120. Under Rule 120 the attorney must obtain court approval before directing a public trustee to conduct a foreclosure sale. Colo. R. Civ. P. 120(d). After the sale, the foreclosure attorney must obtain confirmation from the court that the sale was conducted properly. Colo. R. Civ. P. 120(g). The attorney representing the noteholder in the Rule 120 hearing must be prepared to address significant issues concerning the debt, including the existence of a default, the status of loan modification requests, and evidence of the foreclosing party's status as noteholder. Colo. R. Civ. P. 120(d)(1).

In its foreclosure-related debt collection activities the McCarthy firm uses the office of the public trustee to perform specific tasks. However,

the trustee acts at the firm's direction and relies on McCarthy for all of its information about the loan. The fact that an attorney uses officials such as a public trustee, a sheriff, a judge, and other court personnel as it regularly collects debts does not alter the status of the law firm as a "debt collector" under the FDCPA. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995) ("a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts.").

2. Section 1692a(6)'s First Sentence Subjects a Law Firm that Regularly Collects Mortgage Debts to the FDCPA's Broad Coverage.

Section 1692a(6) of the FDCPA begins with a general definition of "debt collector." This general definition covers entities that "regularly collect" debts and entities that have as their "principal purpose" the collection of debts. 15 U.S.C. §1692a(6) (first sentence). The McCarthy firm regularly enforces mortgage notes. This means that it regularly collects debts. The fact that the notes are secured by deeds of trust does not exclude McCarthy from the general definition of a debt collector.

Section 1692a(6) goes on to state that the general definition of "debt collector" "also includes" entities that have the enforcement of security interests as their principal purpose. 15 U.S.C. §1692a(6) (third sentence). Entities whose principal purpose is the enforcement of security interests, as described in the third sentence, are subject to §1692f(6), a subsection of the FDCPA that prohibits certain misconduct in repossessions.

The inclusion of security interest enforcers in §1692a(6)'s third sentence does not exclude enforcers of mortgage debts from §1692a(6)'s general definition of "debt collector." The text does not say that an entity that regularly collects debts is subject "only to" or is "limited to" compliance with §1692f(6) if it also enforces security interests. The Ninth Circuit in *Ho* implied terms of limitation and exclusion that do not appear in the statute. *Ho,* 858 F.3d at 573–74. To the contrary, Congress stated that the definition of "debt collector" in §1692a(6) "also includes" certain security interest enforcers who violate §1692f(6) as described in the third sentence. Congress employed a term of inclusion, not exclusion, in establishing the relationship between the first and third sentences of §1692a(6). *Wilson v. Draper & Goldberg, P.L.L.C.,* 443 F.3d 373, 378 (4th Cir. 2006) (§1692a(6)'s third sentence "does not exclude those who enforce security interests but who also fall under the general definition of 'debt collector'"); *McCleary v. DLJ Mortgage Capital, Inc.*, 2017 WL 4542054, at *5 (S.D. Ala. Oct. 11, 2017) ("'Also' is a term of addition, not of subtraction, and it makes little sense to say that an entity that satisfies the 'regularly collects' definition has its broad exposure to liability under many substantive provisions erased simply because it also satisfies the 'security interests' definition and/or is enforcing a security interest."); *Burling v. Windsor Equity Group, Inc.*, 2012 WL 5330916, at *3 (C.D. Cal. Oct. 18, 2012) ("Based on the weight of authority, the Court concludes that an entity engaged in the principal business of enforcing security interests is not subject to the FDCPA, *unless* that party acts in violation of §1692f(6), *or* the party falls within the second prong of the definition of a 'debt collector' in that it 'regularly collects or attempts to collect' debts owed to another.")

(emphasis in original). *See also Glazer v. Chase Home Finance, LLC*, 704 F.3d 453, 465 n.6 (6th Cir. 2013) ("Nothing in our decision precludes the application of the entire FDCPA to a repossessor who 'regularly' collects debts for another and thus satisfies the general definition of 'debt collector.'").

3. Section 1692a(6)'s Third Sentence Covers Repossessors of Personal Property Who Are Not Involved in Demands for Payment or Liquidation Sales.

Section 1692a(6)'s third sentence applies to companies that enforce security interests as their principal business but do not regularly collect debts. These companies exist. Section 1692f(6) refers to companies that take "nonjudicial action to effect dispossession or disablement of property." These terms harken to the U.C.C.'s language applicable to enforcement of Article 9 security interests in personal property, U.C.C. §9-609(a). The U.C.C. section provides that "[a]fter default" "a secured party: (1) may take possession of the collateral; and (2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Section 9-610."

Because self-help repossessions under U.C.C. §9-609 can be a risky business, automobile finance lenders hire independent contractors to carry out this work. In doing so, the lenders hope to minimize their exposure to breach of the peace claims. James J. White & Robert S. Summers, *Uniform Commercial Code* §34.18 (6th ed. 2015) (observing that creditors "hire an 'independent contractor' to do the repossession" because "[i]n theory at least, the independent contractor is not authorized to breach

the peace, and if he does so, it is his own problem"). FDCPA §1692f(6) applies to such an "independent contractor." For example, in *Barnes v. Northwest Repossession, LLC,* 210 F. Supp. 3d 954 (N.D. Ill. 2016), the court found that such a contractor violated §1692f(6) when it repossessed a vehicle when the creditor did not have a currently enforceable security interest in the collateral.

The *Ho* court's interpretation of §1692a(6)'s third sentence conflicts with the view of the agencies charged with enforcing and interpreting the FDCPA for the past three decades. In 1988, the Federal Trade Commission ("FTC") issued Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097 (Dec.13, 1988) ("the Commentary"). The Commentary tracks the plain statutory language in its treatment of the term "security enforcers" used in §1692f(6) as follows: "[b]ecause the FDCPA's definition of 'debt collection' includes parties whose principal business is enforcing security interests only for section 808(6) [§1692f(6)] purposes, such parties (*if they do not otherwise fall within the definition*) are subject only to this provision and not to the rest of the FDCPA." 53 Fed. Reg. at 50,108 (emphasis added). The general definition in the first sentence of §1692a(6) thus complements the inclusion of certain security interest enforcers by the third sentence. Similarly, the Consumer Financial Protection Bureau ("CFPB"), charged with interpreting and enforcing the FDCPA since 2011, has repeatedly supported the view that the full range of FDCPA protections apply in all mortgage foreclosure proceedings. The CFPB articulated this view in at least three amicus briefs submitted to the courts of appeals. *Cohen v. Rosicki, Rosicki, &*

Associates, P.C., 897 F.3d 75 (2d Cir. 2018); *Vien-Phuong Thi Ho v. Reconstruct Company, N.A.*, 858 F. 3d 568 (9th Cir. 2017); *Birster v. American Home Mortg. Servicing, Inc.*, 481 Fed. Appx. 579 (11th Cir. 2012). The amicus briefs are available at www.consumerfinance.gov.

4. The FDCPA's Definition of "Debt Collector" Does Not Turn on the Type of Remedy the Entity Exercises.

The relevant activity that triggers broad application of the FDCPA to McCarthy is the collection of debts. Section 1692a(5) defines a "debt" by the underlying transaction and its purpose. The relevant transactions here are promissory notes signed by consumers to finance the purchase of their residences. "Debt" is not defined with reference to the manner in which, years later, the creditor chooses to enforce the obligation. *Cohen v. Rosicki, Rosicki & Associates, P.C.*, 897 F.3d 75, 82–83 (2d Cir. 2018).

A mortgage note can be enforced either by a civil action to obtain a money judgment or by a foreclosure to force a sale of the property. In most jurisdictions, including Colorado, the mortgage creditor has recourse to both options. *Mortgage Investments Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1184–85 (Colo. 2003). Under the *Ho* court's view, a law firm could regularly harass borrowers without concern for the FDCPA as long as it did so only as part of an effort to take the borrowers' homes as part of an effort to comply with state foreclosure law. However, the same law firm would be subject to the full range of FDCPA prohibitions if it enforced the same mortgage note by obtaining a money

judgment and attempting to garnish a few hundred dollars from a borrower's bank account. The text of the FDCPA provides no support for this kind of disproportionate outcome hinging solely on the remedy the debt collector chooses.

C. Mr. Obduskey Stated a Valid Claim for Violation of 15 U.S.C. §1692g.

The Tenth Circuit focused on Mr. Obduskey's claim that the McCarthy firm violated FDCPA §1692g.[6] This provision regulates the debt collector's "initial communication" with the consumer "in connection with the collection of any debt" and establishes the consumer's right to obtain verification of the debt from the debt collector. 15 U.S.C. §§1692g(a), (b). McCarthy's August 2014 letter was the firm's initial communication to Mr. Obduskey. (Ex. 19). The letter informed Mr. Obduskey that the firm had been instructed to commence foreclosure against his home. It told him how much he owed on the debt and advised him to contact the law firm to dispute the debt or to obtain more information about the debt. The letter clearly met the "in connection with the collection of any debt" element of §1692g(a).[7]

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[6] In addition to §1692g, Mr. Obduskey alleged that McCarthy violated other provisions of the FDCPA, including §§1692c, 1692d, 1692e, and 1692f. These provisions, like §1692g, prohibit certain forms of debt collector conduct "in connection with the collection of a[ny] debt" (§§1692c, 1692d, 1692e), or a debt collector's use of certain "means to collect or attempt to collect a debt" (§1692f).

[7] A communication satisfies the "in connection with the collection of a debt" standard even though it does not include a demand for payment. *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 246 (3d Cir. 2014); *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010). *See*

Mr. Obduskey's August 2014 dispute letter to McCarthy in response triggered the debt collector's duty to respond within a fixed time and provide validation information. 15 U.S.C. §1692g(b). McCarthy did not timely respond and instead in May 2015 directed that Mr. Obduskey's home be sold at a foreclosure sale. (J.A. 39).

The Tenth Circuit agreed that Mr. Obduskey "sufficiently pled that McCarthy failed to verify Mr. Obduskey's debt after it was disputed, in violation of §1692g." *Obduskey,* 879 F.3d at 1220. The court's ruling that McCarthy's conduct violated a substantive provision of the FDCPA has not been challenged.

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also Grden v. Leikin Ingber & Winters PC, 643 F.3d 169, 173 (6th Cir. 2011) ("So the question is where to draw the line. We draw it at the same place the Seventh Circuit did in *Gburek:* for a communication to be in connection with the collection of a debt, an animating purpose of the communication must be to induce payment by the debtor. . . .Thus, to use the language of §1692e, a letter that is not itself a collection attempt, but that aims to make such an attempt more likely to succeed, is one that has the requisite connection."). The debt collector's subjective intent behind a communication is irrelevant. The standard is objective. The court must consider how the "least sophisticated consumer" would view the communication. *Jacobson v. Healthcare Financial Services, Inc.*, 516 F.3d 85, 90 (2d Cir. 2008).

III. Compliance with the FDCPA Does Not Impede Compliance with Colorado Foreclosure Law.

A. The FDCPA Debt Validation Process Under 15 U.S.C. §1692g Furthers Effective Use of the Right to Cure Under Colo. Rev. Stat. §38-38-104.

Colorado has no interest in promoting unnecessary foreclosures. The state has enacted a statute that allows homeowners to reinstate or "cure" mortgage defaults during much of the foreclosure process. Colo. Rev. Stat. §38-38-104. Under this law a homeowner can submit to the public trustee a request to cure a mortgage default and stop foreclosure up to twelve days before a scheduled foreclosure sale. Colo. Rev. Stat. §38-38-104(2)(a)(I). Pursuant to the statute, when a homeowner seeks to cure a default, the attorney who prepared the notice of election to sell the property must prepare a detailed statement of the arrearage and give it to the trustee. The trustee relies on this statement to implement a cure.

Mr. Obduskey's August 2014 letter sought information directly related to his right to cure. McCarthy ignored the letter. Having law firms comply with §1692g(b) promotes the exchange of accurate information about mortgage debts and thus furthers the paramount public policy goal of Colorado's mortgage cure statute.[8]

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[8] The Government Sponsored Enterprises ("GSEs") Fannie Mae and Freddie Mac own or insure most residential mortgage loans in the United States. All standard GSE security instruments contain terms allowing homeowners to cure mortgage defaults before acceleration and before a foreclosure sale. Standard GSE Security Instrument ¶¶ 19, 22). FDCPA

Data from the Colorado trustees show that the cure right makes a difference. For example, in Denver, the state's largest county, the trustee reports that for the first seven months of 2018 borrowers requested to cure in 39% of the cases referred for foreclosure. Homeowners implemented cures in 15% of the cases.[9] Statewide data reflect that during 2017 homeowners implemented cures in 10% of the cases sent to foreclosure.[10] Notably, at the state level in 2017 foreclosures were withdrawn in 71% of the cases referred to the trustees for foreclosure.[11] These withdrawals would include not only cures, but instances of loan modifications, short sales, and other loss mitigation alternatives to foreclosure.

B. The Tenth Circuit's Concerns About Conflicts Between the FDCPA and Colorado Foreclosure Law Are Unfounded.

The Tenth Circuit raised two concerns about FDCPA preemption of Colorado law, both taken directly from the *Ho* court's view of California law. The Tenth Circuit's concerns were: (1) the motion for a court order authorizing a foreclosure sale under

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§1692g also furthers the exercise of this contractual right to cure, an important loss mitigation policy of these major federal home loan programs.

[9] Compiled from monthly average figures reported by Denver Office of the Clerk and Recorder, at https://www.denvergov.org/content/denvergov/en/denver-office-of-the-clerk-and-recorder/foreclosures/foreclosure-stats.html.

[10] Colorado foreclosure statistics from the Colorado County Treasurers and Public Trustees Association, available at http://www.e-ccta.org/PTAC/foreclosure%20statistics.htm.

[11] *Id.*

Colo. R. Civ. P. 120(a) must be served on non-debtors, such as junior lienholders, potentially violating 15 U.S.C. §1692c(b); and (2) the motion must be served directly on homeowners, and the homeowners could be represented by counsel, violating 15 U.S.C. §1692c(a)(2). *Obduskey,* 879 F.3d at 1222.

Colorado Rule of Civil Procedure 120 specifically directs that service of the foreclosure motion packet be made on junior lienholders and on the borrower. An exception under §§1692c(a) and 1692c(b) shields communications made with "the express permission of a court of competent jurisdiction." 15 U.S.C. §§1692c(a), 1692c(b). As the Seventh Circuit recently held, this exception applies to a debt collector's communications mandated by a court rule. *Holcomb v. Freedman Anselmo Lindberg, LLC,* ___F.3d___, 2018 WL 3984544, at *2 (7th Cir. Aug. 21, 2018) ("A court rule expressly *requiring* a certain action obviously *permits* that action, so a rule requiring service directly on a party expressly permits such service.") (emphasis in original).

Another exception under §§1692c(a) and 1692c(b) shields communications made with "the prior consent of the consumer given directly to the debt collector." In the narrow context of communications required by state foreclosure statutes, courts have predictably found that the ubiquitous clauses in deeds of trust in which the borrower consents to a power of sale foreclosure in the event of a default have conveyed consent for the purposes of §§1692c(a) and 1692c(b). *Walker v. Fabrizio & Brook, P.C.,* 2017 WL 5068340, at *3 (E.D. Mich. Nov. 2, 2017); *McCray v. Samuel I. White, P.C.,* 2017 WL 1196586, at *7 (D. Md. Mar. 31, 2017); *Maynard v. Cannon,* 650 F. Supp. 2d 1138,

1143 (D. Utah 2008), *aff'd,* 401 Fed. Appx. 389 (10th Cir. 2010). Application of these rulings here is consistent with the prevailing FDCPA jurisprudence that has invoked these consent exceptions sparingly, typically to avoid absurd or anomalous results. *E.g., Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1168–73 (9th Cir. 2006). *See generally* H.R. Rep. No. 131, 95th Cong., 1st Sess. 5 (1977). Indeed, the dissent in *Ho* noted that these consent exceptions appropriately addressed the majority's concerns about potential conflicts between the FDCPA and California foreclosure law: "the net effect of the borrower's consent is to permit the foreclosure to go forward in the manner prescribed by California law." *Ho,* 858 F.3d at 588 (Korman, D.J., dissenting).

This Court has cautioned against constructions of §1692c that needlessly thwart creditors' established statutory remedies under state laws. *Heintz v. Jenkins,* 514 U.S. 291, 296 (1995) (agreeing that "it would be odd if the Act empowered a debt-owing consumer to stop the 'communications' inherent in an ordinary lawsuit and thereby cause an ordinary debt-collecting lawsuit to grind to a halt"). Lower courts have followed this directive and interpreted the FDCPA and state foreclosure laws to shield communications to the borrower and lienholders necessary to comply with state foreclosure law. *Nadel v. Marino,* 2017 WL 4776991, at *2 (D. Md. Oct. 20, 2017) (no violation of §1692c(b) when foreclosure trustee filed "a motion as part of ordinary litigation"). *See Acosta v. Campbell,* 309 Fed. Appx. 315, 316 (11th Cir. 2009) (no §1692c(b) violation in communications between lender's counsel and counsel for junior mortgagee).

Courts have held that the FDCPA applies to foreclosures in circuits that comprise the majority of states in the United States. Appellate court rulings date back to 2006, when the Fourth Circuit ruled in *Wilson v. Draper & Goldberg,* 443 F.3d 373 (4th Cir 2006). The Tenth Circuit pointed to no specific instances where courts have found that a foreclosure law firm violated the referenced FDCPA sections merely by serving a court filing or recorded document on parties in the manner prescribed by state foreclosure law. Notably, the law in Colorado since 1992 has been that the broad scope of FDCPA provisions apply to foreclosure proceedings under Colo. R. Civ. P. 120. *Shapiro & Meinhold v. Zartman,* 823 P.3d 120, 124 (Colo. 1992) (*en banc*). The Tenth Circuit's hypothetical concerns about the FDCPA crippling Colorado foreclosures never materialized. Mr. Obduskey's validation of debt claim under §1692g did not interfere with the conduct of a foreclosure under Colorado law. Rather, compliance with the FDCPA would have furthered state law goals and objectives.

IV. The FDCPA Addresses Pervasive Problems in the Residential Mortgage Industry

Foreclosures are costly both for borrowers and for investors in mortgage debt. Studies have shown that investors can lose up to one-half of their investment in mortgage debt when a foreclosure takes place. Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications,* 41 Conn. L. Rev. 1107 (2009) (average loss to investors on a foreclosed loan was $150,000, over 50% of loan

amount, based on extensive 2008 data).[12] These losses quickly rise to billions of dollars when viewed across the entire industry. Groups representing investors in mortgage loans have emphasized that servicers' mishandling of borrowers' accounts harms their interests as well as borrowers:

> Mortgage investors typically invest on behalf of state pension funds, retirement systems, university and charitable endowments. Overall, more than 90 percent of the money invested in mortgage-backed securities represents public money. These investors have suffered material losses as a result of faulty and inefficient and at times improper servicing of the mortgage loans, for example, the improper analysis of a borrower's finances and holistic debt. Instead of helping homeowners, servicers' interactions with borrowers often make the process more confusing. This delays resolutions and can worsen the homeowners' position. The current servicing model further harms borrowers by dumping excessive fees (ultimately recouped by servicers) on them during the modification process. More broadly, the abuses and conflicts

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[12] More recent estimates of loss severities range from 25% to 45% depending on the type of loan. *Standard and Poor's Global Rating U.S. Residential Mortgage Performance Snapshot* (2d Quarter 2016) at p.14. Available at https://www.spratings.com/documents/20184/1393097/US+Residential+Mortgage+Performance+Snapshot+-+Q2+2016/85bda6bc-06d4-4e52-9c9a-059e53f9e784.

> within today's broken servicing model are creating longer term housing and mortgage problems that impact large parts of the U.S. population.[13]

Most residential mortgages in the United States are owned, guaranteed, or insured by the two government sponsored enterprises (Fannie Mae and Freddie Mac). Three federal agencies, the Federal Housing Administration (FHA), the Veterans Administration, and the Department of Agriculture's Rural Housing Service, insure another significant portion of American residential mortgage loans. There is therefore an enormous public fiscal stake in preventing unnecessary foreclosures.

Mortgage servicers and their attorneys operate under financial incentives that are not consistent with the interests of investors in mortgage debt. Tara Twomey and Adam Levitin, *Mortgage Servicing,* 28 Yale J. on Regulation 1 (2011). Servicers typically service loans owned by others and these servicers do not have a direct financial stake in how the loans perform. They do not get paid more when a loan performs well, and instead they can benefit from recovering advances, costs, and fees when a foreclosure takes place. Diane E. Thompson, *Foreclosing Modifications, How Servicers' Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755 (2011).

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[13] American Association of Mortgage Investors, *White Paper: The Future of the Housing Market for Consumers after the Crisis: Remedies to Restore and Stabilize America's Mortgage and Housing Market* (Jan. 2011) at p. 1. Available at https://www.nclc.org/mortgage-servicing-books-tools-and-other-resources/mortgage-servicing-other-resources.html

In addition to these misplaced incentives, the fragmentation of tasks within the mortgage servicing and foreclosure industries has caused many of the problems that plague investors and consumers. Servicers, their attorneys, and a wide range of subcontractors operate from silos, using software programs that are poorly coordinated and produce inconsistent and inaccurate information. Attorneys and servicers in turn communicate this misinformation to consumers.

The courts aptly described the structural problems that impair foreclosure attorneys' ability to provide accurate account information to homeowners in the case of *In re Taylor,* 655 F.3d 274 (3d Cir. 2011). The Third Circuit affirmed the extensive findings of the bankruptcy court regarding a foreclosure firm's debt collection practices in the bankruptcy court. *In re Taylor,* 407 B.R. 618 (Bankr. E.D. Pa. 2009). The bankruptcy court in *Taylor* had inquired into why a foreclosure firm repeatedly filed documents claiming inconsistent and erroneous amounts due on mortgage debts. Testimony from the staff of the servicer and the law firm revealed that a software program essentially hired and controlled the law firm and operated with virtually no input from human staff of the servicer. Non-attorney staff drafted documents based solely on the data uploaded from a contractor's computer platform. The bankruptcy court raised significant questions as to how foreclosure attorneys could comply with their ethical obligation to investigate facts and exercise independent judgment when the computer program created a virtual wall between the attorneys and the owners of the obligations. 407 B.R. at 645. In affirming the bankruptcy court's imposition of sanctions on the law firm, the Court of

Appeals noted that the lawyers' practice "emphasized high-volume, high speed processing of foreclosures to such an extent that it led to violations of Rule 9011." 655 F.3d at 287.

State courts have had to devote substantial resources to dealing with the careless practices of foreclosure law firms. *See Homeward Residential Inc. v. Gregor*, 122 A.3d 947, 952 (Me. 2015) ("Applying established law, however, has become more problematic as courts address the problems the financial industry has created for itself."); *Deutsche Bank v. Johnston*, 369 P.3d 1046, 1053 (N.M. 2016) (noting "pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory notes, and more generally the recording of interests in property"); *U.S. Bank N.A. v. Ibanez*, 941 N.E.2d 40, 55 (Mass. 2011) (decrying "the utter carelessness with which the plaintiff banks documented the titles to their assets") (Cordy, J. concurring). Bankruptcy courts have come to similar conclusions about how foreclosure law firms operate.[14]

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[14] *In re Waring*, 401 B.R. 906 (Bankr. N.D. Ohio 2009) (critiquing servicer's practice of farming out legal work in manner that precluded debtors and their attorneys from communicating with owner of obligation); *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008) (local counsel's restricted relationship with national counsel effectively barred local counsel from communication with client); *In re Ulmer*, 363 B.R. 777 (Bankr. D.S.C. 2008) (sanctions imposed against law firm that allowed out-of-state paralegals to prepare motions filed electronically with court without attorney review); *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006), *subsequent decision at* 369 B.R. 193 (Bankr. D.N.J. 2007), *aff'd*, 2007 WL 1946656 (D.N.J. June 27, 2007) ($125,000 penalty under Rule 9011 assessed against law firm for filing 150 robosigned motions with court).

Computer programs commonly used by mortgage servicers, the foreclosure firms' clients, also lead to many types of accounting abuses. The bankruptcy court examined these systems in *In re Jones,* 366 B.R. 584 (Bankr. E.D. La. 2007), *subsequent decision at* 2007 WL 2480494 (Bankr. E.D. La. Aug. 29, 2007), *aff'd,* 391 B.R. 577 (E.D. La. 2008). After an extensive investigation the bankruptcy court in *Jones* concluded that the servicer overcharged the homeowner $24,450.65 during the twenty-nine months her chapter 13 plan was in effect. *Jones,* 366 B.R. at 604. The servicer involved was Wells Fargo, the nation's largest. The company admitted it had used its standard practices in the case. The servicer could not explain many of its own charges, including multiple duplicative property inspection charges, some of which were reported as incurred during times when the property was inaccessible after Hurricane Katrina. 366 B.R. at 596–98.

The Consumer Financial Protection Bureau tracks the subject area and nature of consumer complaints to the Bureau. Debt collection disputes consistently produce the highest volume of complaints. Mortgage servicing also generates one of the highest complaint levels. Consumer Financial Protection Bureau, *Monthly Complaint Report* Vol. 19 (Jan. 2017), at p. 5 (debt collection ranks first with 292,903 cumulative complaints since 2011, mortgages third, with 260,482 cumulative complaints). During the foreclosure crisis many homeowners sought help to avoid foreclosure through the use of loan modifications. Servicer mishandling of these applications was widely

documented.[15] Mismanagement of homeowners' requests for loss mitigation heightens investors' losses because it allows unnecessary foreclosures to proceed.

Parties conducting foreclosures are subject to extensive regulation. The government guarantors Fannie Mae and Freddie Mac publish extensive guidelines that foreclosure attorneys and their clients must adhere to throughout the foreclosure process.[16] Most residential mortgages in the United States are subject to these guidelines. The guidelines include requirements for ongoing contact to conduct loss mitigation reviews during foreclosure. Government insurers such as the FHA also require strict compliance with guidelines for loss mitigation

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[15] United States Government Accountability Office, *Troubled Asset Relief Program: Results of Housing Counselor Survey of Borrower Experiences in the HAMP Program GAO Report 11-367R* (May 26, 2011); United States Government Accountability Office, GAO Report to Congressional Committees, *Troubled Asset Relief Program, Further Action Needed to Fully and Equitably Implement Foreclosure Mitigation Program 14–28* (June 24, 2010) (GAO 10-634); Office of the Special Inspector General for the Troubled Asset Relief Program, SIGTARP, Quarterly Report to Congress (Oct. 26, 2010); California Reinvestment Coalition, *The Chasm Between Words and Deeds X:How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities* (May 2014).

[16] Fannie Mae Single Family Servicing Guide Part D and E (August 15, 2018), available at https://www.fanniemae.com/content/guide/servicing/index.html, and Freddie Mac Single Family Seller/Servicer Guide, Series 9000, available at http://www.freddiemac.com/singlefamily/pdf/guide.pdf.

reviews during foreclosures.[17] The 2012 National Mortgage Settlement involving the largest mortgage servicers, state attorneys general, and federal agencies established new communication guidelines that apply during foreclosure.[18] The RESPA mortgage servicing rules promulgated by the CFPB in 2014 codified many of the National Mortgage Settlement's requirements concerning the content and timing of communications about the status of mortgage loans in default.[19]

Broad FDCPA coverage holds foreclosure attorneys and servicers accountable to provide accurate information about consumers' accounts and helps ensure that foreclosures occur only when it is appropriate under state law. The FDCPA provides an incentive to improve account management technology while discouraging other practices, such as fee maximization and ignoring viable loss mitigation options.

V. At a Minimum, Security Interest Enforcers Are Liable for Violations of Section 1692f(6).

While the Tenth Circuit followed nearly all aspects of the Ninth Circuit's reasoning in *Ho*, the court departed from the Ninth Circuit (and all other courts) with respect to one issue. According to the Tenth Circuit, no provisions of the FDCPA applied to non-judicial foreclosures in Colorado. *Obduskey*, 879

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[17] U.S. Dept. of HUD Single Family Policy Handbook 4000.1 Part III (Mar. 2016). Available at https://www.hud.gov/program_offices/housing/sfh/handbook_4000-1.

[18] National Mortgage Settlement Consent Decree Terms. Available at http://www.nationalmortgagesettlement.com/about.html.

[19] 12 C.F.R. § 1024.35 through § 1024.41.

F.3d at 1224 n.4. All other courts that endorsed the narrow view of debt collection in the foreclosure context have agreed that the provisions of §1692f(6) apply to entities carrying out nonjudicial foreclosures. *Dowers v. Nationstar Mortgage, L.L.C.*, 852 F.3d 964, 971 n.3 (9th Cir. 2017). All parties in *Ho* agreed that the trustee was a debt collector within the narrow scope of §1692f(6). *Ho*, 858 F.3d at 573.

Section 1692f(6) defines as "unfair practices," *inter alia*, taking or threatening to take property if "there is no present right to possession of the property claimed as collateral through an enforceable security interest." 15 U.S.C. §1692f(6)(A). Courts rejecting a broad application of the FDCPA to foreclosures still have applied §1692f(6) when a party conducted a foreclosure without complying with terms of the deed of trust. *See, e.g., Puryer v. HSBC Bank USA NA*, 419 P.3d 105, 113 (Mont. 2018). Other courts have held that attempts to enforce a deed of trust without authority to act for the noteholder may violate §1692f(6). *Dowers v. Nationstar Mortgage, L.L.C.*, 852 F.3d at 971; *Moore v. Federal National Mortgage Association*, 2012 WL 424583, at *5 (W.D. Wash. Feb. 9, 2012). Foreclosing without authority to enforce the loan documents causes significant harm to consumers. The practice also impairs the reliability of titles that pass through foreclosure deeds. *See* Adam J. Levitin, *The Paper Chase: Securitization, Foreclosures, and the Uncertainty of Mortgage Title*, 63 Duke L.J. 637 (2013); Elizabeth Renuart, *Uneasy Intersections, The Right to Foreclose and the U.C.C.*, 48 Wake Forest L. Rev. 1205 (2013). Enforcement of §1692f(6) as written to debt collectors conducting nonjudicial foreclosures

promotes reliable property transfers and dependable land records.

Without reference to these concerns, the Tenth Circuit rejected any role for §1692f(6) in Colorado foreclosures. 879 F.3d at 1224 n.4. In the court's view, the McCarthy firm's client, Wells Fargo, could never be accused of conducting a foreclosure sale without authority. This was because Wells Fargo did not hold title to the property and was not trying to get possession of the property. Instead, according to the court,"[i]it is the *public trustee* who holds the deed of trust and sells the property." *Id.* (emphasis in original). Wells Fargo thus had "no present right to possession of the property nor could they take possession of the property." *Id.* The gist seems to be that, because McCarthy did not purport to represent anyone who had an interest in the property, the firm could not plausibly be accused of trying to take the property without authority.

There are many errors in this analysis. To begin with, the Colorado public trustee does not hold title to a property through a deed of trust. Colorado law expressly prohibits such a transaction. Colo. Rev. Stat. §38-35-117 (deed of trust creates lien, cannot place title in trustee).[20] In conducting a foreclosure, McCarthy represents the "Holder of Evidence of Debt." Colo. Rev. Stat. §§38-38-101, 38-38-102.5. The holder of the note automatically holds title to the deed of trust. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) §5.4(a) (1997). In order to foreclose, McCarthy must represent repeatedly in

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[20] In property law parlance, Colorado follows the "lien theory" as opposed to the "title theory" of mortgages. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 4.1 (1997).

documents it serves on the borrower and submits to the public trustee and the court that it represents the holder of the note secured by the deed of trust. (Ex. 19, 20). Colo. Rev. Stat. §§38-38-101(2), (4), 38-38-105, 38-38-106; Colo. R. Civ. P. 120(a)(1).

After the public auction sale, the trustee executes a foreclosure deed and other documents that convey title to the sale purchaser. Colo. Rev. Stat. §§38-38-401, 38-38-405, 38-38-501 to 38-38-504. However, in this process the trustee, like a sheriff or private auctioneer, does not take title to or obtain possession of the property for itself. The Tenth's Circuit's analysis completely ignores the fact that the law firm *directs* the trustee in all activities the trustee performs. The court essentially construed the relationship backwards. In the court's view the trustee appears to be an independent actor who decides when and how to foreclose, while the law firm sits by passively. In reality, the law firm tells the trustee when to start the foreclosure, how much to demand, when to stop the foreclosure, and when to go ahead. The scope of the law firm's activities give it ample opportunity to violate §1692f(6).

CONCLUSION

For the reasons set forth above, the ruling of the Tenth Circuit should be reversed.

Respectfully submitted,

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